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June 28, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St., SW, Room TWB-204
Washington, DC 20554

Re: Notice of Ex Parte Presentation:
In the Matter of Implementation of the Local Competition Provisions in the Local Telecommunications Act of 1996, Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98

Dear Ms. Salas:

On Friday June 22, 2001, Rich Rubin, Michael Pfau and I had a meeting with Jeremy Miller Julie Veatch and Patrick Murphy, of the Common Carrier Bureau's Policy and Program Planning Division, to discuss issues associated with the aforementioned proceeding. Attached is a presentation outline which formed the basis of the discussion. Also attached is a letter referenced in that discussion filed by SBC with the Enforcement Bureau earlier this year. The positions expressed by AT&T were consistent with those contained in the Comments and ex parte filings previously made in this docket.

Two copies of this Notice are being submitted in accordance with Section 1.1206 of the Commission's rules.

Sincerely,

Robert W. Quinn, Jr.

cc: Jeremy Miller
Julie Veatch
Patrick Murphy

High Capacity Loops & Transport

CLECs' Impairment Reaffirmed

AT&T Presentation to the FCC

June 22, 2001

High Capacity Loops &Transport Essential to Competition

- Competitors cannot compete effectively against ILECs in the provis services that rely on high capacity facilities without access to loops transport as UNEs
- Despite numerous incentives to use alternative facilities, CLECs ha forced to rely on ILEC loop and transport facilities
  - "AT&T almost never self-provisions DS1 transport and self provides D only a small fraction of the time." (AT&T Reply, Fea/Taggart at 6)
  - Focal "most often has no choice but to order the ILEC's high capacity dedicated transport transport to serve its customers." (Focal Reply at 4-
  - "interoffice transport capacity is rarely available form sources other tha ILEC." (El Paso Networks Reply at 12)
  - WorldCom has penetrated only a small fraction of commercial office b has deployed only modest amounts of local fiber. (WorldCom Reply at Attachment at 1-7)
  - "AT&T reaches only a fraction of a percent of all commercial building ILEC facilities" (AT&T Reply, Fea/Taggart at 30)

The Factual "Impairment" Case Ha Changed

- After reviewing a substantial record -- on both side *UNE Remand Order* specifically found that CLEC generally cannot obtain alternatives to ILEC loop a transport facilities, including high capacity facilitie
- The updated record shows nothing has changed sin that alters the Commission's conclusion
  - Even in the most competitive state, ILECs are s dominant providers, even for high capacity faci (*see* NYDPS Order)
  - CLECs comments and declarations show no pra and economic alternatives to ILEC loops and tr exists

The ILECs' Litigation Strategy Continues Unabated

- Despite these facts, the ILECs continue to pursue a pronged strategy to hobble competition:
  - Deny unrestricted use of loops and transport by competit
  - Eliminate cost-based access to high capacity loops and tr
- The ILECs seek to protect monopoly special access and eliminate access to facilities the CLECs need t support facilities based competition
- According to the ILECs, it is unfair for them to pay cost charges for RC but it is entirely acceptable for to pay twice the cost of loop and transport facilities

The Commission Must Act Prompt
Restore Order

- The ILECs' constant intransigence creates market
and makes it very difficult and very expensive for
fund investments
- The Commission must act promptly to restore orde
marketplace, by
  - Eliminating use restrictions and prohibitions on
mingling;
  - Finding that CLECs are impaired in the absence
capacity loops and transport unbundled element
  - Re-starting the clock on a three-year quiet perio
the loop and transport UNEs

CLECs Are Entitled to Prompt Ac

- Given the perilous state of the CLEC industry, the overwhelmingly shows that Commission must act promptly
  - Use limitations on UNEs are not permissible un Act
  - The need for national unbundling of *all* loop an transport UNEs remains unchanged, regardless service(s) provided via the UNEs
  - The ILECs' claim that CLEC are unimpaired w access to high capacity facilities is unsupported completely rebutted by the CLECs' documente experience

The ILECs' Claims Are Wrong

- The ILECs rest their case on four assertions regard changed conditions since 1999:
  - Special access competition increased dramatica
  - CLECs have made the transport facility investm necessary to ubiquitously serve special access customers
  - CLECs have or could easily install their own lo facilities to serve large customer locations
  - The number of CLEC collocations demonstrate alternate supply of transport is pervasive
- Each of these assertions is demonstrably false

CLECs' Market Share Has No Significantly Changed

- Despite all the ILECs' "facts" – many of which are exaggerated or simply wrong – their own data show CLECs' share of the relevant markets is only 3% g than in 1999 (33% vs. 36%)
- In fact, the ILECs' market share estimates are exag
  - The CLECs' actual market share is only about 2
  - The CLECs' share growth is about 2% since 19
- Given the imprecision of the share estimates, there evidence of any material change in share, much les significant increase in competition

Extensive Deployment of CLEC L
Fiber Is a Myth

- The ILEC "Fact Report" incorrectly mixes CLECs' investme haul fiber with their negligible investment in metro/local fibe present a distorted picture of available alternatives:
  - Long haul fiber cannot be used to replace ILEC loops or local
  - 30% of the total "fiber miles" cited by the ILECs can be elimin only simple investigation – 17% is long haul only, 13% is with reselling carriers
  - Double counting of fiber appears pervasive due to capacity sha arrangements among carriers
  - Bankruptcies of many CLECs makes reliance upon their faciliti dubious strategy
  - The CLEC industry and industry observers acknowledge metro capacity is scarce (e.g., Time Warner, Dain Rauscher Wessels)

CLEC Building Penetration Is Gro Overstated

- The ILECs' overstating of the numerator (by doubl counting penetrations of the same building) and sh of the denominator (by counting only large comme office buildings) still only produces a 25% penetra level
  - Stated another way, 3 out of 4 prime building lo are connected *only* to the ILEC network
  - In fact, the penetration rate is only in the range 6%, and many penetrated buildings only have a specific floors

CLEC Collocation Is Necessary Bu Sufficient

- Existence of collocation does not equate to availab loop and transport alternatives
  - Many CLEC collocations are used solely to pro advanced services
  - Even where CLECs have collocated, they must primarily on the ILEC for transport
  - ILEC practices foreclose alternative supply dev
    - Transport-only collocation is prohibited
    - CLEC-to-CLEC cross-connects between collocation restricted

ILEC Claims of Reduced Investme Incentives Ring Hollow

- Lifting use restrictions and co-mingling prohibitions will not eliminate competitors' investment incentives
  - High-capacity loops and transport are essential to development networks and are part of the natural progression of investment
    - Connectivity must be ubiquitous
    - Facilities have huge economies of scale but provide little ability to differentiate retail service
    - Loop and transport UNEs are effectively fixed costs that must be u the maximum extent
- The ILECs' argument is, in fact, inconsistent -- on the one h claim competition is pervasive (which should drive prices to on the other hand they claim restrictions help to keep retail p to provide investment incentives (which means prices are *no* approaching costs)

The Commission Must Not Rely Upon ILECs' Unsubstantiated Theoretical M

- Apparently recognizing the lack of factual support "Fact Report" and their earlier claims, the ILECs commissioned an economist's "study" of CLECs' a to build facilities between existing fiber facilities ar individual buildings
- The Crandall study is undocumented and cannot be credited
- More important, the Crandall study's conclusions a reached only by ignoring the real-world barriers to building facilities and are rebutted by the CLECs' s declarations

Bad Assumption and Bad Input Y
Only Unreliable Conclusions

- The Crandall study is based on three inadequately disclosed
  On the surface, they disregard or fail to properly reflect many
  world" impairments:
  - Local/metro fiber is scarce
  - Laterals must connect to customer sub-rings/metro rings *not* tra
    rings
  - Lack of ROW and building access limits fiber lateral constructi
  - Construction costs are understated
  - Lengthy delays occur between the start of construction (spendi
    generation of revenue
  - Rarely (if ever) does a single CLEC serve all customer demand
    building
  - CLECs face significant costs of service in addition to lateral co
    and LD costs

The Case For Continuing Impairme Compelling

- The CLECs have built a complete and consistent fa record that convincingly demonstrates impairment access to unbundled high-capacity loops and transp
  - To the extent alternatives exist, the record show
    - High costs to self-supply
    - Inadequate market coverage through alternative supp
    - ILEC impediments to potential alternative supply
    - Lengthy delays before service delivery
  - The NYDPS validates these facts, finding that V remains the dominant provider of high capacity facilities in New York, perhaps the most compe state in the US

The Case For Continuing Impairme Compelling

- It is only economic or practical for CLECs to place a few "on-network"
  - Building access negotiations, permit requirements, R arrangements, franchise fees and requirements for co construction are major impediments to CLEC built-o
  - Over-builds are cost prohibitive for both loops and tr
  - CLECs must compete with the ILEC, which almost a the ability to serve the customer immediately
  - CLECs cannot expect to "win" all customers in a bui
  - Customers resist rolling existing ILEC services to CL facilities
- Capital markets are essentially closed to CLECs and CL rapidly failing

There Is No Basis for A Nationa "De-Listing" of Any Individual U

- The ILECs have failed to demonstrate that any type listing – national or otherwise – is appropriate for l transport
- National de-listing of any UNE is counter-intuitive
  - Competition has not, and will not, develop unifo all places within the same time frame
  - Any unbundling must take account of local cond
- The Commission should pursue the NYDPS' sugge develop standards that states can apply to prepare recommendations for the Commission to consider f specific UNEs in specific areas in the future

The Commission Must Act Nov

- The interim use restrictions and prohibitions on co-mingling must be eliminated *immediately*
- The Joint Petition should be rejected on the merits loops and dedicated transport, including high capac facilities, should be reaffirmed as UNEs for a new "quiet period"
- The Commission should pursue an NPRM to defin procedures for relaxing ILEC unbundling obligatio targeted basis

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April 27, 2001

Frank G. Lamancusa
Deputy Division Chief, Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Potential Accelerated Docket Matter – CoreComm Communications/Z-Tel Communications

Dear Mr. Lamancusa:

The purpose of this letter is to provide SBC's response to the request by CoreComm Communications, Inc. ("CoreComm") and Z-Tel Communications, Inc. ("Z-Tel") (together referred to as "complainants") for initiation of an Accelerated Docket process regarding Ameritech's alleged refusal to permit the use of shared transport to terminate intraLATA toll calls to Ameritech's local exchange customers.[1] As explained below, complainants' invocation of the Commission's dispute resolution process is procedurally out-of-order, and their allegations are in any event entirely unfounded.

A. Complainants' Allegations Are Wholly Unsuited To The Accelerated Docket.

CoreComm and Z-Tel request that the Commission accept their complaint, once filed, on the Common Carrier Bureau's Accelerated Docket. In determining whether to heed such a request, the Bureau assesses whether, among other things, the complaint would "fall[] within the Commission's jurisdiction," as well as whether it would raise a "number of distinct issues" that could give rise to complex discovery. 47 C.F.R. § 1.730(e)(3), (4). Complainants' allegations fail on both counts. Their proposed complaint does not fall within the Commission's jurisdiction, and, even if it did, the "likely complexity of the . . . discovery" necessary to support it would render it wholly unsuited to accelerated treatment.

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[1] *See* Letter from Bruce Bennett, CoreComm Communications, Inc., and Ron Walters, Z-Tel Communications, Inc., to Frank Lamancusa, FCC (Mar. 15, 2001) ("CoreComm/Z-Tel March 15 Letter").

1. Complainants' primary allegation is that Ameritech has refused to allow complainants to use shared transport to terminate intraLATA toll calls to Ameritech local exchange customers, and has thereby failed to adhere to its obligations under section 251(c)(3). *See* CoreComm/Z-Tel March 15 Letter at 2-3. The 1996 Act makes unmistakably clear, however, that such disputes concerning section 251(c) are to be determined in the first instance not through complaint proceedings before this Commission, but rather through private negotiations and, if necessary, state commission arbitrations.[2] Thus, "[i]f there are problems with carriers . . . failing to satisfy [section 251(c)] duties . . . , the Act establishes *the sole remedy*: state PUC arbitration and enforcement proceedings, with review by federal courts."[3] Were the rule otherwise, "[t]he elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing" an FCC complaint. *See Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 401 (7th Cir. 2000). Congress did not intend such a result.

Indeed, the Eighth Circuit has squarely rejected the proposition that complainants may seek the relief they claim before this Commission. According to that court, it is state commissions, not the FCC, that have the power to ensure through arbitration proceedings "that parties comply with the regulations that the FCC is . . . authorized to issue under the Act." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).[4] The Eighth Circuit further emphasized that "[t]he only grant of any review or enforcement authority to the FCC is contained in subsection 252(e)(5), and this provision authorizes the FCC to act only if a state commission fails to fulfill its duties under the Act." *Iowa Utils. Bd.*, 120 F.3d at 804. The complainants do not suggest that any relevant state commission has "fail[ed] to fulfill its duties under the Act." Their complaint should be rejected on this ground alone.

Nor can complainants attempt to circumvent the Act's negotiation and arbitration provisions by claiming that they seek interpretation or enforcement of their existing agreements, rather than arbitration of a new one. As the Commission itself has held, the Act's procedural framework applies not just to the negotiation and arbitration of agreements, but also to the interpretation and enforcement of their terms. *See, e.g., Starpower Communications, LLC*

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[2] *See* 47 U.S.C. § 251(c)(1) (each ILEC has a "duty to negotiate in good faith in accordance with section 252 . . . the particular terms and conditions of agreements to fulfill the duties described in [section 251(b) and (c)]"); *id.* § 252(a)-(e) (setting out detailed procedures and standards for state commission arbitration of disputed terms and federal court review thereof).

[3] *Goldwasser v. Ameritech Corp.*, No. 97 C 6788, 1998 WL 60878, at *11 (N.D. Ill. Feb. 4, 1998) (emphasis added), *aff'd*, 222 F.3d 390 (7th Cir. 2000); *see also AT&T Communications of California, Inc. v. Pacific Bell*, 60 F. Supp. 2d 997, 1001-02 (N.D. Cal. 1999).

[4] The Supreme Court vacated the Eighth Circuit's decision on this point as unripe, but in doing so it cast no doubt on the Eighth Circuit's reasoning. *AT&T Corp.*, 525 U.S. at 386. To the contrary, three Justices went out of their way to note that the Eighth Circuit's reasoning "carries considerable force," *see id.* at 407 n.3 (Thomas, J., joined by Rehnquist, C.J., and Breyer, J., concurring in part and dissenting in part), and no Justice suggested the contrary.

Petition for Preemption, 15 FCC Rcd 11277, 11279-80, ¶ 6 (June 14, 2000).[5] Accordingly, regardless of whether a complainant seeks arbitration, interpretation, or enforcement of an interconnection agreement, any effort to inject the Commission into the dispute resolution process in the place of a state commission does equal violence to the statutory scheme.

Nor, finally, can the complainants avoid this procedural obstacle by casting their claim as arising under paragraph 56 of the SBC/Ameritech Merger Conditions. *See* CoreComm/Z-Tel March 15 Letter at 3. As complainants themselves concede, *see id.*, that paragraph expressly states that its requirements are "subject to state commission approval." *SBC/Ameritech Order*, 14 FCC Rcd 14712, 15023-34, App. C ¶ 56 (1999). Thus, enforcement of this paragraph – no less than enforcement of section 251(c) itself – requires resort to state commission arbitration procedures. Complainants' failure to invoke those procedures is thus fatal to their claim here.

2. Complainants' proposed complaint is unsuited to the Accelerated Docket for a second reason. As noted at the outset, a complaint is unworthy of accelerated treatment if it would entail a "number of distinct issues" that could give rise to "complex[] . . . discovery." 47 C.F.R. § 1.730(e)(3). As the above discussion makes clear, complainants' allegations are governed by the terms of their many interconnection agreements with Ameritech. Accordingly, the resolution of their complaint will necessarily involve careful review of the terms of each such interconnection agreement, including, for example, whether the agreements provide for the service or facility they want. If, on the one hand, those agreements do provide for that service or facility, the parties will then have to investigate whether complainants have followed contractual dispute resolution provisions in seeking to enforce that agreement language. If, on the other hand, the agreements do not provide for the service or facility, the parties would then be required to investigate whether and the extent to which complainants challenged the absence of such language, either in arbitration proceedings before state commissions or in federal court pursuant to 47 U.S.C. § 252(e)(6). Each of these inquiries, moreover, will have to take place separately for each complainant, in each state in which the complainant alleges Ameritech to have violated its shared transport obligations. Resolution of complainants' allegations is therefore likely to be a highly complex matter involving extensive discovery. Thus, even apart from the fact that the complaint would not "fall[] within the Commission's jurisdiction," 47 C.F.R. § 1.730(e)(4), it would not be an appropriate matter for the Accelerated Docket.

That is all the more so because the legal question that complainants raise is unsettled. As noted above, CoreComm's and Z-Tel's proposed complaint is predicated on the claim that they are entitled to use shared transport to terminate interexchange calls to the local exchange customers of other carriers. But as explained in more detail below, that very question has been pending before the Commission in a rulemaking for several years. *See infra* page 5. Because

[5] *See also, e.g.*, *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946-47 (8th Cir. 2000); *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 479-80 (5th Cir. 2000); *Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, 179 F.3d 566, 570 (7th Cir. 1999), *cert. granted in part sub nom. Mathias v. WorldCom Techs., Inc.*, 121 S. Ct. 1224 (2001); *accord Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 303 (4th Cir. 2001) (state commission decisions interpreting or enforcing interconnection agreements are to be appealed to state courts).

complainants' allegations require first and foremost the resolution of that highly disputed question, those allegations clearly not suited to the Accelerated Docket.

B. Neither Section 251(c)(3) Nor The Merger Conditions Authorizes CLECS To Use Shared Transport To Provide End-To-End IntraLATA Toll.

Even apart from the proposed complaint's procedural defects, it is wholly lacking on the merits. CoreComm and Z-Tel believe that they are entitled to use the UNE-platform to provide not just local service, but to provide intraLATA toll service as well, even where that toll service is terminated to end-users that are not their own customers. *See* CoreComm/Z-Tel March 15 Letter at 1-2. Yet contrary to complainants' unsupported assertions, nothing in the Commission's rules or orders provides any support for that claim.

1. Complainants' principal claim is that section 251(c)(3) of the 1996 Act authorizes them "to use shared transport to carry intraLATA toll traffic originated by [their] local exchange customers to the terminating end office of SBC/Ameritech's customers." *Id.* at 2. But the Commission's own orders make clear that the shared transport network element is available to aid CLECs' entry into the *local*, not the long distance, market: "[R]equiring incumbent LECs to provide unbundled access to shared transport is consistent with the Act's goal of encouraging requesting carriers to rapidly enter *the local market*." *UNE Remand Order*, 15 FCC Rcd 3696, 3865, ¶ 379 (1999) (emphasis added); *see also id.* at 3864, ¶ 375 n.740 (concluding that carriers would be "impaired" without access to shared transport "in the early stages of entry" into "the local exchange market"). Indeed, any conceivable doubt that the Commission's shared transport unbundling analysis was restricted to the local market is conclusively resolved by the Commission's *Shared Transport Order*, 12 FCC Rcd 12460 (1997). There, the Commission concluded that shared transport satisfied the standards of 47 U.S.C. § 251(d)(2) – the "necessary" and "impair" standards – specifically because "access to transport facilities on a shared basis is particularly important for stimulating initial competitive entry into the *local exchange market*, because new entrants have not yet had an opportunity to determine traffic volumes and routing patterns." 12 FCC Rcd at 12482, ¶ 35 (emphasis added).

CoreComm and Z-Tel nevertheless contend that the Commission's orders requiring the unbundling of shared transport extend to the use of that element in the provision of intraLATA toll service. *See* CoreComm/Z-Tel March 15 Letter at 2-3. But Ameritech's intraLATA toll service is a long-distance service, which is a completely separate market from local exchange and exchange access. Thus, as the statute makes clear, the Commission could only order the access complainants seek pursuant to an entirely different "necessary" and "impair" analysis than the one it conducted in the *Shared Transport* and *UNE Remand Orders*. *See* 47 U.S.C. § 251(d)(2). There can be little doubt, moreover, that any such analysis would lead to the conclusion that the shared transport element could *not* be unbundled for purposes of intraLATA toll consistent with section 251(d)(2). As the Commission has recognized, the intraLATA toll market is competitive.[6] Indeed, in the Ameritech region, more than a dozen carriers provide

[6] *See, e.g., Fifth Access Charge Reform Order*, 14 FCC Rcd 14221, 14245 ¶ 48 (1999) ("The BOCs and independent incumbent LECs provide . . . intraLATA toll services in competition with the long-distance services of AT&T, Sprint, MCI, and many other long-distance companies."); *see also* FCC Common Carrier Bureau, Industry Analysis Division, *Statistics of the Long*

facilities-based intraLATA toll service. If CoreComm or Z-Tel wish to carry the intraLATA toll traffic of their local exchange customers over someone else's network, there are any number of interexchange carriers with whom they could partner in order to do so.

Of course, if CoreComm or Z-Tel took that route, they, like any other carriers that provide interexchange service, would be subject to access charges for the termination of that traffic to customers of Ameritech or of other CLECs. And that, of course, raises the real reason for CoreComm's and Z-Tel's complaint. Access charges remain a critical source of funding for universal service, and CoreComm and Z-Tel obviously want to avoid those charges. As the complainants boldly explain, they want to use shared transport to "terminat[e]" interexchange calls "to SBC/Ameritech customer[s]," and thereby avoid the "terminating access charges" that would otherwise apply to "the cost of completing that call." *See* CoreComm/Z-Tel March 15 Letter at 2. But such regulatory arbitrage is no part of the Commission's rules. While the Commission's *Shared Transport Order* makes clear that ILECs must permit CLECs to use unbundled network elements to provide exchange access to their *own* local exchange customers, that same order makes equally clear that ILECs need *not* permit CLECs to use UNEs to provide exchange access to *anyone else's* customers. *See Shared Transport Order*, 12 FCC Rcd at 12462, ¶ 2 ("incumbent LECs must permit requesting carriers to use shared transport as an unbundled element to carry originating access traffic from, and terminating access traffic to, *customers to whom the requesting carrier is also providing local exchange service*") (emphasis added).[7]

Indeed, in that same *Shared Transport Order*, and then again in the *UNE Remand Order*, the Commission requested comment on "whether requesting carriers may use shared transport facilities in conjunction with unbundled switching, to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service." *Shared Transport Order*, 12 FCC Rcd at 12462, ¶ 3; *see UNE Remand Order*, 15 FCC Rcd at 3969, ¶ 496. The face of complainants' allegation makes clear that this is precisely what they want to do. *See* CoreComm/Z-Tel March 15 Letter at 2 ("The Joint Complainants seek to use shared transport to carry intraLATA toll traffic originated by Joint Complainants' local exchange customers to the terminating end office of SBC/Ameritech's customers . . . ."). Complainants' conclusory assertions notwithstanding, the Commission has simply not granted them that right.[8]

Distance Telecommunications Industry, at Table 9 (rel. Jan. 24, 2001) (providing market shares of the many carriers that provide toll service).

[7] The Commission has made the same point with respect to unbundled local switching: "[A] requesting carrier that purchases an unbundled local switching element for an end user may not use that switching element to provide interexchange service to end users for whom that requesting carrier does not also provide local exchange service." *Local Competition Reconsideration Order*, 11 FCC Rcd 13042, 13049, ¶ 13 (1996). Because unbundled switching "cannot be effectively disassociated from" shared transport, *Shared Transport Order*, 12 FCC Rcd at 12485, ¶ 42, that statement further confirms that a CLEC may not use shared transport to originate or terminate interexchange calls to customers that are not local exchange customers of the CLEC.

[8] The Commission's refusal to permit CLECs to use shared transport to bypass terminating access charges is consistent with its decision in the *UNE Remand* proceeding to restrict the use of

2. Nor can that right be gleaned from the SBC/Ameritech Merger Conditions. Complainants rely on paragraph 56 of those conditions, which requires that, "subject to state commission approval," SBC "shall offer shared transport" in the Ameritech region "under terms and conditions, other than rate structure and price, that are substantially similar to (or more favorable than) the most favorable *terms [Southwestern Bell Telephone Company] offer[ed]* to telecommunications carriers in Texas as of August 27, 1999." *SBC/Ameritech Order*, 14 FCC Rcd at 15023-24, App. C ¶ 56 (emphasis added); *see* CoreComm/Z-Tel March 15 Letter at 3-4. But the only "terms" of any relevance that Southwestern Bell "offer[ed] to telecommunications carriers in Texas as of August 27, 1999" were terms that only allowed CLECs to use shared transport to provide intraLATA toll end-to-end *pending the implementation of intraLATA dialing parity*: "After the implementation of intraLATA Dialing Parity, intraLATA toll calls from [CLEC] [unbundled local switching ports] w[ould] be routed" *not* to shared transport for the purpose of terminating those calls, but rather to "the end user intraLATA Primary Interexchange Carrier (PIC) choice."[9] Because intraLATA dialing parity has been implemented – and indeed *had* been implemented as of August 27, 1999 – the terms Southwestern Bell offered to CLECs as of August 27, 1999 did not include what CoreComm and Z-Tel seek here – the claimed right to bypass terminating access charges.

Recognizing this, CoreComm and Z-Tel seek to rely not on the actual "terms [Southwestern Bell] offer[ed]" to telecommunications carriers in Texas as of August 27, 1999, but rather on the terms of a Texas PUC order that had temporarily enjoined Southwestern Bell from enforcing the terms that it did offer. *See* Order Issuing Interim Ruling Pending Dispute Resolution, *Birch Telecom of Texas, Ltd., LLP v. Southwestern Bell Tel. Co.*, Docket Nos. 20745 & 20755, at 3 (Pub. Util. Comm'n of Tex. Apr. 26, 1999). But it was only pursuant to the terms of that Texas PUC order, not the terms Southwestern Bell was offering to CLECs, that, as of August 27, 1999 Southwestern Bell "was allowing" a few particular CLECs "to use its entire shared transport network to route CLEC-originated intraLATA toll calls to a [Southwestern Bell] terminating end office." CoreComm/Z-Tel March 15 Letter at 3. Indeed, had any "telecommunications carrier[] in Texas" requested on August 27, 1999, agreement terms that would have allowed the carrier to use shared transport for end-to-end intraLATA toll, Southwestern Bell would have denied that request, and would have been fully within its rights in doing so. It was not until November 4, 1999 – more than two months after the relevant date for purposes of the Merger Conditions – that the Texas PUC issued its arbitration order forcing

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loop-transport UNE combinations to provide special access. *See UNE Remand Supplemental Clarification Order*, 15 FCC Rcd 9587, ¶ 7 (2000) ("allowing the use of combinations of network elements for special access could undercut universal service by inducing IXCs to abandon switched access for unbundled network element-based special access on an enormous scale").

[9] Interconnection Agreement Between Southwestern Bell Tel. Co. and Sage Telecom, Inc., App. Pricing-UNE § 5.2.2.2.1.2; Interconnection Agreement Between Southwestern Bell Tel. Co. and Birch Telecom of Texas Ltd., LLP, App. Pricing-UNE § 5.2.2.2.1.2 (both quoted in Arbitration Award, *Birch Telecom of Texas, Ltd., LLP v. Southwestern Bell Tel. Co.*, Docket Nos. 20745 & 20755, at 5 (Pub. Util. Comm'n of Tex. Nov. 4, 1999).